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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1986

KEWAL JAIN,

Petitioner,

vs.

ITT GRINNELL CORPORATION,

Respondent.

# RESPONSE TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Attorney for Respondent

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## QUESTIONS PRESENTED

1. Did the Petitioner, by acting in such a way as to demonstrate clear acquiescence to the trial of this case before the court and abandonment of his demand for a jury trial, waive any right that he might have had to a jury trial?

2. May the Petitioner, having failed to object in any manner to the trial of this case before the court, raise the issue of the right to a jury trial for the first time on appeal?

## LIST OF CORPORATE AFFILIATES OF ITT GRINNELL CORPORATION

ITT GRINNELL CORPORATION (Respondent) has changed its name since the filing of this suit. Its new corporate name is ITT FLUID TECHNOLOGY CORPORATION.

Parent corporation: ITT HOLDINGS, INC.

Parent of parent: ITT CORPORATION

Subsidiaries of Respondent:

GRINNELL GMBH (German corp.)

Affiliates of Respondent (subsidiaries of Respondent's parent:

1. INTERNATIONAL STANDARD ELECTRIC CORPORATION
2. ITT LTD. (U.K. corp.)
3. ITT CANADA LTD. (Canadian corp.)
4. ITT INDUSTRIES, INC.
5. FLYGT CORPORATION

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## STATEMENT OF THE CASE

The Statement Of The Case presented by Petitioner in his Petition omits numerous critical facts. Therefore, it is necessary for Respondent to supplement the Petitioner's Statement with the following facts.

This case involves a complaint by the Petitioner that he was terminated from his job by the Respondent because of his national origin and/or his religion. The case was set for jury trial on January 16, 1984, as reflected in the district court's Notice of Trial Setting, issued on December 28, 1983. The case was subsequently placed on the non-jury docket, as is reflected by the district court's Order of January 12, 1984.

The record is silent as to how this case was transferred from the jury docket

to the non-jury docket. On January 16, 1984, the day of trial, the following "MEMO OF PROCEEDINGS" is found on the Docket Sheet: "Attorneys announced ready. ETT: 2 days. Non-jury trial to be held sometime this week." Petitioner has failed to bring forward any record of the statements of counsel on January 16, 1984, but the Docket Sheet clearly shows that Petitioner's trial attorney announced ready for a non-jury trial at that time. (It should be noted that the attorney for the Petitioner on January 16, 1984, the attorney for Petitioner at the time of trial on July 1, 1985, and the attorney who represents Petitioner at present, are all different attorneys from different firms.)

The record is silent as to why the case was not tried the week of January

16, 1984, but the record clearly shows that at least four subsequent Notices of Trial Settings were sent to the parties notifying them that the case was set for NON-JURY trial. These were sent out on January 31, 1984, for trial on March 5, 1984; on March 4, 1985, for trial on March 25, 1985; on April 9, 1985, for trial on May 2, 1985; on May 2, 1985, for trial on July 1, 1985. A fifth Notice, sent March 12, 1984 for trial on March 26, 1984, was also apparently for non-jury trial, since no jury selection was provided for. There is no record of any objection having been made to these non-jury settings by the Petitioner.

Furthermore, on September 12, 1984, the Petitioner filed a Motion For Leave To Amend Complaint. The Petitioner also filed a copy of his proposed Third Amended Complaint, which was returned to

was returned to him after the Court denied his motion on October 1, 1984. (Docket Sheet entry of 10-4-84). That proposed Amended Complaint contains no demand for a jury.

The record also shows that the Petitioner not only never raised the issue of a jury trial again, and not only announced ready for a non-jury trial, but further shows that he, without qualification, prepared and filed a Proposed Pre-Trial Order for a non-jury trial and also prepared and filed Proposed Findings of Fact and Conclusions of Law for a non-jury trial.

On July 1, 1985, the Petitioner's attorney, without qualification or any reference to the prior demand for a jury, announced ready for trial before the Court on a non-jury basis. (Trial Transcript, page 2) The case then

proceeded to trial before the Court without any objection having ever been raised concerning the lack of a jury trial.

The complete absence in the record of any objections to a trial before the Court, the announcements of "ready" by the Petitioner's counsel on the non-jury docket, the multiple notices of non-jury trial sent to the Petitioner's attorney and received without objection, the preparation of a non-jury pre-trial order by the Petitioner's attorney, and the submission to the Court of a proposed findings of fact and conclusions of law by the Petitioner's attorney for a non-jury trial, all point to one inescapable conclusion: that the Petitioner voluntarily waived any right that he might have had to a jury trial in this case. Respondent's position is that the Petitioner had no right to a jury

trial in any event, but should that issue be decided against Respondent, there can be no doubt that the Petitioner's rights were waived and that he failed to preserve any error in the denial of a jury trial, if any error occurred.

The Fifth Circuit Court of Appeals was of the opinion that the main issue in the appeal was whether the District Court erred in denying Petitioner's motion for leave to file an amended complaint on January 12, 1984, four days before the first trial setting. The Court of Appeals held that there was no error because of the time constraints involved. Respondent would call the Court's attention to the fact that after the January 16, 1984 trial setting was passed, the Petitioner did not make any further demand for a trial by jury, although he had ample time to do so. (The trial did not occur until almost 18

months later.) He did, however, attempt to amend his complaint again to add a wage and hour claim, which motion was denied. (Plaintiff's Third Amended Complaint) As Respondent has previously shown, that proposed amended complaint did not include a jury demand. His motion for leave to amend was denied because it attempted to allege a new claim (wage and hour claim) after discovery had been completed. (Order of 10-1-84) It is clear that the Petitioner's attempt to amend was not an effort to get a jury trial on the issue of racial discrimination, but to add the new wage and hour claim.

Therefore, whether this case is viewed in terms of the denial of the right to a jury trial, or as an abuse of discretion for denying the Petitioner leave to amend his complaint, it is clear that the Petitioner waived any rights he might have had to a jury trial by his

conduct, and failed to preserve any error that there might have been.

## SUMMARY OF ARGUMENT

A. The Petitioner has cast his petition in terms of the entitlement to a jury trial in a racial discrimination case under 42 U.S.C. 1981. The true issue in this case, however, is whether the Petitioner waived any rights that he might have had to a jury by virtue of his complaint and his demand for a jury trial. The record clearly shows that Petitioner acquiesced to a trial before the court, thus waiving any right he had to a jury trial.

B. Contrary to the Petitioner's contentions, the decision of the Fifth Circuit on this issue is not in conflict with the decisions of this Court and the decisions of other courts of appeals. The finding of a waiver by the Fifth Circuit is not a substantial departure from the accepted and usual course of judicial proceedings in applicable cases.

C. A second issue is whether Petitioner properly preserved any error that may have occurred by trying this case to the court. By failing to object to a trial to the court, Petitioner failed to preserve any error that may have occurred. Furthermore, having failed to raise the issue before the trial court, he may not raise that issue for the first time on appeal.

## ARGUMENT

### I.

### Assuming That The Petitioner Had A Right To A Jury Trial In This Case, He Waived That Right By Acquiescing To A Trial Before The Court

The right to a jury trial may be waived. See, Quaker City Gear Works, Inc., v. Skil Corp., 747 F.2d 1446, 1453 (Fed. Cir. 1984), cert. denied, 105 S.Ct. 2676, 86 L.Ed.2d 694. (Right to have jury determine any factual issue waived by agreeing that jury not answer all questions on special verdict, and that court should answer remaining questions). Even when a jury trial has been demanded, failure to object to the submission of a case to the judge instead of a jury waives the right to to a jury trial. Allen v. Barnes Hospital, 721 F.2d 643 (8th Cir. 1983); Southland Reship, Inc.

v. Flegel, 534 F.2d 639 (5th Cir. 1976); Amburgey v. Cassady, 507 F.2d 728 (6th Cir. 1974); Chapman v. Kleindienst, 507 F.2d 1246 (7th Cir. 1974); See, Kearney v. Case, 79 U.S. (12 Wall) 275, 284, 20 L.Ed. 395 (1871). When, by his conduct, a party acquiesces to a trial before the court, his conduct constitutes a waiver of any rights to a jury that he may have. National Family Ins. Co. v. Exchange Nat. Bank of Chicago, 474 F.2d 237 (7th Cir. 1973); Bradley v. Maryland Casualy Company, 382 F.2d 415 (8th Cir. 1967) (written by then-Circuit Judge Blackmun); Bass v. Hoagland, 172 F.2d 205 (5th Cir. 1949), cert. denied, 388 U.S. 816, 70 S.Ct. 57, 94 L.Ed. 494 (1949).

In Allen v. Barnes Hospital, supra, the Eighth Circuit was presented with a case that was very similar to the instant case. The plaintiff in that case had filed a Title VII claim (42 U.S.C. §

2000e et seq) and a Section 1981 claim. (42 U.S.C. § 1981). For some unknown reason, the case was placed on the court's non-jury docket eighteen months before trial. Neither the plaintiff nor her attorney objected, either before or during the trial, when the absence of a jury was obvious. The court applied the general rule that failure to object to the submission of the case to a judge instead of a jury waives the right to a jury. Allen is on all-fours with the instant case, and should be controlling. The Petitioner had the same eighteen month period to object to a trial before the court, and failed to do so. His attorney announced ready for non-jury trial, prepared proposed findings of fact and conclusions of law, prepared a pre-trial order for a non-jury trial, and acquiesced in every way to the trial before the court. Clearly, he waived any right that he might have had to a jury

trial.

In Southland Reship, Inc. v. Flegal, supra, a case involving the Sherman Act and certain state law claims, the plaintiff had demanded a trial by jury. The trial court consolidated hearings on preliminary and permanent injunctions, although the proper procedure would have been to try the legal claims before hearing the permanent injunction issue. However, counsel for the plaintiff clearly acquiesced in the procedure employed by the trial court, which resulted in a waiver of his right to have a jury determine the issue of liability. The court found that the plaintiff's counsel understood that the issue of liability was being submitted to the court in the injunction hearing, and that he participated nonetheless, even to the extent of submitting proposed findings

of fact and conclusions of law without objection. This, the court held, constituted a waiver.

Likewise, in the present case, the Petitioner's attorney participated in the trial before the court without objection, and submitted proposed findings and conclusions. As in Southland, this should constitute a waiver of the right to a jury.

In Amburgey v. Cassady, supra, the plaintiff had filed suit under 42 U.S.C. 1983, and had requested a jury trial. However, at a hearing prior to trial, when the court suggested that a jury trial might cause delay, the plaintiff's attorney stated, in effect, that he was not especially anxious to try the case before a jury, and that he knew a non-jury trial would be quicker. His statements, coupled with the fact that he commenced trial before the court without

objection, constitued waiver of his earlier demand for a jury. Similarly, in the present case, Petitioner's counsel announced ready for non-jury trial and went to trial without objection.

In Bradley v. Maryland Casualty Company, supra, the court again held that the conduct of counsel constituted a waiver of the right to a jury trial. In that case, then Circuit-Judge Blackmun found, among other things, that the following facts demonstrated a waiver of a jury trial: the long acceptance by the parties that the case was one for the court; representations of waiver by counsel at pre-trial; and proceeding to trial without further motion or objection. All of these factors are present in this case.

In summary, there is ample authority from several circuits that supports the Respondent's contention that the

Petitioner waived any right he may have had to a jury trial. Even though a jury was originally demanded, the Petitioner clearly acquiesced to the case being tried before the court, in that no objection to the notices of non-jury trial setting was ever made; the last proposed amended pleading did not contain a jury demand; the Petitioner's counsel announced ready for trial before the court on two occasions (January 16, 1984, and July 1, 1985); his counsel prepared a pre-trial order for a non-jury trial; his counsel prepared proposed findings of fact and conclusions of law for the court; and the Petitioner and his counsel proceeded to trial before the court on July 1, 1985, without any objection or motion related to a trial by jury. Under these circumstances, it is clear that a waiver occurred. No conflict exists among the circuit courts of appeal on

this issue as is apparent from the above cited cases. Those cases show that the accepted and normal course of judicial proceedings in such cases is to allow the parties to proceed to trial before the court where they clearly desire to do so, and to consider prior jury demands waived.[1]

[1]Respondent is aware of the requirements of Fed. Rule of Civil Procedure 39a, concerning trial by the court when a jury demand has been made. Respondent's position is that a) the conduct of Petitioner in acquiescing to a trial before the court satisfies the demand of an oral stipulation made in open court, and b) there was no right of trial by jury in the first place, because the suit, a Title VII employment case, was equitable in nature. See, Lynch v. Pan American World Airways, Inc., 475 F.2d 764 (5th Cir. 1973). In any event, neither party has raised the issue of Rule 39 previously, and the above cases clearly show that jury demand can be waived by a party's conduct without an actual oral stipulation under that Rule.

II.

The Petitioner May Not Complain About The Lack Of A Jury Trial For The First Time On Appeal

Since no objection to the non-jury trial was made by the Petitioner at the trial court level, this complaint was raised for the first time on the Petitioner's appeal to the Fifth Circuit. Having failed to raise the issue before the trial court, the Petitioner may not raise it for the first time on appeal. Youakim v. Miller, 425 U.S. 231, 96 S.Ct. 1399, 47 L.Ed.2d 701 (1976); National Family Ins. Co. v. Exchange Nat. Bank of Chicago, supra at 241. Furthermore, having failed to properly preserve the alleged error by objection, the Petitioner has waived any error that might have occurred. See, Adams v. U.S., 318 F.2d 861 (9th Cir. 1963). Therefore, Petitioner should not be allowed to raise

the issue of right to trial by jury in the instant case, having failed to properly raise that issue in the trial court and having failed to properly preserve any alleged error.

## CONCLUSION AND PRAYER

In summary, this is not a proper case for this Court to use to resolve the conflict between the circuits as to the right to a jury trial in cases involving Title VII and Section 1981 claims. Even assuming that the Petitioner was entitled to a jury trial in this case, the facts clearly show that he waived any such right. There is no conflict among the circuits on this point, and this Court itself has acknowledged that the right to a jury may be waived. In this case, the Petitioner, having made an initial demand for a jury, thereafter acted in such a way as to make it clear that he had abandoned that demand, and acquiesced to the trial of this case before the court. In view of these facts, the petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned member of the Bar of the United States Supreme Court, hereby certify that three copies of this response to Petitioner's Writ of Certiorari were served by certified mail, return receipt requested on attorney of record for Petitioner, Mr. David Lopez, 7660 Woodway, Suite 250, Houston, Texas 77063, this 24 day of December, 1986.

Bob Burleson

BOB BURLESON